the Board was in effect saying that the appellant was carrying on the trade of dealing with the land, and was seeking planning permissions to enhance the eventual realised prices of those parcels.

If the intention of the appellant was to hold the two parcels as investments at the time of their acquisition (which is not our finding), we are satisfied on all the evidence and are prepared to find that after the sales of the 11 terrace houses, the appellant had changed his intention and had regarded the two parcels as trading stocks to be sold as soon as the price is right. The appellant did not have the financial capability nor any plan to develop the two parcels with flats and terrace houses and hold them as investments.

In our opinion, on these facts it cannot be said that the Board's finding was erroneous in law or based on insufficient evidence and therefore the Board's finding cannot be upset on appeal. Accordingly, the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Chor Pee & Co.*

TAN TONG MENG CO. (PTE.) LTD. v. ARTIC BUILDERS & CO. (PTE.) LTD.

[O.C.J. (Rajah J.) June 8, 1981]

[Singapore — Originating Motion No. 31 of 1980]

Arbitration — Interim Award — Application to set aside, varied or remitted to Arbitrator — Remission Order — Misdirection by Arbitrator — Refusal by him to make available notes of evidence to counsel and to re-open case — Breach of rules of natural justice.

Administrative Law — Natural justice — Arbitration — Refusal of arbitrator to make available notes of evidence to counsel and to re-open case — Breach of rules natural justice amounting to misdirection on arbitrator's part.

By a written agreement dated November 15, 1975, the defendants agreed to erect and complete for the plaintiff a 19-storey apartment block. Clause 25(1) of the said agreement provided for the determination of the contract by the employer, i.e. the plaintiffs. On May 17, 1978 the plaintiffs' architects wrote to the defendants indicating dissatisfaction with the defendants' work and instructing the defendants to attend to certain defects in the building. On June 2, 1978, the plaintiffs' solicitors wrote the defendants' solicitors claiming damages for delay and terminating the contract forthwith. Reference was made to Clause 25(1). The dispute was then referred to a single arbitrator who made an Interim award on May 9, 1979. The plaintiffs sought to set aside, vary or remit to the Arbitrator the Interim Award on 5 grounds. The plaintiffs contended, *inter alia*, that the interim award did not deal with all the matters referred to by the Arbitrator for his decision. The remission went to the Arbitrator and he published his Findings pursuant to Order of Court of March 4, 1980. The plaintiffs then filed another Originating Motion to set aside, vary or remit the Interim Award as amplified by the Arbitrator's said Findings.

Held: (1) the Arbitrator misdirected himself when he said that for the purposes of the remission hearing, the notes of evidence, not having been made part of the Interim Award, could not be availed of by either party for clarification as to what happened at the original hearing. This refusal of the Arbitrator to make available the notes of evidence for clarification purposes to the plaintiffs resulted in the plaintiffs not getting the kind of hearing intended by the remission, that is to say, a fair hearing;

(2) it cannot be right in principle for an arbitrator to rely on or quote in justification of his award from a document which he had expressly excluded from his Interim Award and which he had refused the party adversely affected, a sight of;

(3) the Arbitrator's ruling not to re-open the case and to hear no further submissions as to what notices were given which satisfied termination under Clause 25(1)(b) amounted to a failure of justice;

(4) justice would be done between the parties if the award were set aside. It would be open to the parties to take such steps as they think fit to resolve their present dispute.

Cases referred to:-

(1) *Societe Franco-Tunisienne D'Armement-Tunis* v. *Government of Ceylon* [1959] 1 W.L.R. 787.

(2) *E. Rotheray & Sons Ltd.* v. *Carlo Bedarida & Co.* [1961] 1 Ll.L.R. 220, 225.

ORIGINATING MOTION.

P. Selvadurai for the plaintiffs.

C.S. Wu for the defendants.

Cur. Adv. Vult.

Rajah J.: By a written agreement dated November 15, 1975 made between the defendants and the plaintiffs the defendants agreed to erect and complete for the plaintiffs a 19-storey apartment block at Thomson Road on the terms and conditions therein contained.

Clause 25(1) of the said agreement provided for the determination of the contract by the employer, in the instant case the plaintiffs, and it reads as follows: —

"25(1) If the contractor shall make default in any one or more of the following respects, that is to say: —

(a) If he without reasonable cause wholly suspends the carrying out of the Works before completion thereof, or

(b) If he fails to proceed regularly diligently with the works, or

(c) If he refuses or persistently neglects to comply with a written notice from the architect requiring him to remove defective work or improper materials or goods and by such refusal or neglect the works are materially affected, or

(d) If he fails to comply with the provisions of clause 17 of these conditions, then the architect may give to him a notice by registered post or recorded delivery specifying the default, and if the contractor either shall continue such default for fourteen days after receipt of such notice or shall at any time thereafter repeat such default (whether previously repeated or not), then the employer without prejudice to any other rights or remedies, may within ten days after such continuance or repetition by notice by registered post or recorded delivery forthwith determine the employment of the contractor under this contract provided that such notice shall not be given unreasonably or vexatiously.

...."

On May 17, 1978, the architects in charge of the project under the contract acting under Clause 25(1) wrote to the defendants by A.R. Registered Post as follows: —

"M/s Artic Builders & Co. Pte. Ltd.
50 Somme Road,
Singapore 8.

Dear Sirs,

Contract Between Tan Tong Meng Co. Pte. Ltd. and Yourselves for Construction of One Block of 19-Storey Apartments on Lots 2461 MK.17 at Thomson Road, Singapore known as Tan Tong Meng Tower

We refer to our letters dated 24th and 27th April, 2 letters dated the 3rd May, and letters dated 13th May and 16th May 1978. Copies of these letters are attached hereto for your convenient reference.

We have repeatedly pointed out to you the defects in your work, the deliberate delay and from time to time the total suspension of work by you and to properly and diligently carry out the works by you.

The Employers, Tan Tong Meng Co. Pte. Ltd. would now give you formal notice that you are to forthwith carry out our instructions as already been given to you. In particular the instructions are:—

(a) To hack off and re-plaster the portions of walls and ceilings pointed out to you as defective and to re-paint them in accordance with our letter of 27th April 1978 (copy of which is attached). In this respect although we have asked you to attend to these defects, first of all in Units A and B on the first floor, you have not up to date satisfactorily and completely done so. You have therefore to forthwith attend to all the defects in Units A and B on the first floor in accordance with the second paragraph of our letter of the 27th April 1978 and let us give our approval before you may proceed with the other units.

(b) At all times you shall have a sufficient number of workers attending to the works at the site so that there will be a maintenance of the progress of work that will meet with our satisfaction. In other words therefore there shall be no further delay or suspension of work and that all the works relating to repairing or rectification of defects and completion of the construction of the whole building must be carried out properly, regularly and diligently.

Please take notice that if you should fail to comply with this notice the Employers Tan Tong Meng Co. Pte. Ltd. will exercise their right to determine the contract under Clause 25(1).

The Employers Tan Tong Meng Co. Pte. Ltd. reserve the right at all times to claim liquidated and other damages against you.

Yours faithfully,
Sgd. ONG SIEW MAY."

This letter was followed up by an A.R. Registered letter dated June 2, 1978 from the plaintiffs' solicitors under Clause 25(1) purporting to terminate the contract and it reads as follows:—

"Messrs Donaldson & Burkinshaw
Clifford Centre
Raffles Place
Singapore 1.

Dear Sirs,

Contract No. R10/72 between Tan Tong Meng Co. Pte. Ltd. and Artic Builders & Co. Pte. Ltd. for construction of one block of 19-storey apartments on Lot 2461, Mukim 17 at Thomson Road, Singapore, known as Tan Tong Meng Tower

We act for Tan Tong Meng Co. Pte. Ltd. We understand that you are acting for Artic Builders & Co. Pte. Ltd.

Our clients have referred to us the Contract dated 15th November 1975 which they have entered into with your clients for the above project.

We are instructed that your clients have failed to complete the project which should have been completed by the 25th July 1977 as provided in the Contract. Under Clause 22 of the Contract, your clients are therefore liable to our clients the sum of $500/- for each and every day of the delay. Our clients' architects Messrs Ong & Ong have written to your clients on the 27th May 1978 claiming the sum of $153,000/- being the liquidated damages provided for at $500/- a day for the delay of completion for the period from 26th July 1977 to 27th May 1978 (a period of 306 days). Please note that this claim for liquidated damages is not final and it is accruing day by day until the project is completed.

We are further instructed to refer to the architects' notice to your clients dated the 17th May 1978 under Clause 25(1) of the Contract. The architects have requested your clients to attend to certain things as stated in the notice. However up to date your clients have failed to comply with them. Therefore as provided by the Contract, our clients now exercise their right to forthwith terminate the Contract.

Your clients are hereby required to forthwith remove their tools from the site and henceforth your clients and their workmen will not be allowed to enter the site. Our clients are engaging other contractors to complete the works and all the costs involved therein will be referred to your clients. Our clients reserve the right to claim all the damages against your clients to which they are entitled.

Yours faithfully,
Sgd. S.K. LEE & Co."

Towards the end of June 1978 all matters in dispute between the parties were referred to a single Arbitrator who published his reasoned Interim Award on May 9, 1979.

By Originating Motion No. 39 of 1979 the plaintiffs sought to set aside, vary or remit to the Arbitrator the Interim Award on the five following grounds namely:—

1. That the Interim Award does not deal with all the matters referred to by the Arbitrator for his decision.
2. That the said Interim Award is bad on the face of it because the principle therein stated as the principle of law according to which the said Arbitrator proposed to make his award is erroneously stated or applied.
3. That the said Interim Award, predicated as it is, upon the limited issues and facts that may have fitted into the framework of Clause 25(1)(c) of the Agreement dated November 15, 1975 between the plaintiffs and the defendants has not considered all the other issues, facts and matters that were germane to the question of whether the plaintiffs' termination of the said Agreement was legally valid. In this respect, the learned Arbitrator erred in law in basing his said Interim Award upon his limited construction of Clause 25(1)(c) of the Agreement instead of basing his award on a construction of the whole of Clause 25(1) of the said Agreement under which the plaintiffs had terminated the said Agreement. In so limiting his vision to a construction of Clause 25(1)(c) only the learned Arbitrator had erred in law in directing his mind only to the issue of internal plastering and not also to the other wider breaches of contract by the defendants relied upon by the plaintiffs to terminate the said Agreement.
4. That the said Interim Award is unclear and ambiguous on the issues of liability that were raised in the pleadings that were filed in the arbitration.
5. That the learned Arbitrator erred in law in ruling that the plaintiffs had not complied with the provisions of Clause 25(1)(c).

The Motion was heard on 3rd and 4th days of March 1980 when I directed that:—

"1. The case be remitted to the Arbitrator, Mr. H.E. Cashin, on the question of whether the respondents had made Clause 25(1)(a) and Clause 25(1)(b) of the Building Contract dated the 15th day of November 1975 part of their case, and if so, the Arbitrator do make his findings on the respondents' case under these Clauses.

2. The costs of the motion be reserved with liberty to apply on the question of costs."

The remission went to the Arbitrator and he published his Findings pursuant to Order of Court of

March 4, 1980. Arising from the said Findings the plaintiffs have now filed another Originating Motion No. 31/80 wherein they seek an order that the said Interim Award as amplified by his said Findings may be set aside, varied or remitted to the Arbitrator for reconsideration on seven grounds. The first five grounds relied on are the same as those in the first Motion. The other sixth and seventh grounds are new and they read as follows: —

"6. That the learned arbitrator erred in law in ruling in effect that it was sufficient for the defendants to try their best to comply with instructions instead of directing his mind to whether the defendants had fulfilled their obligations under the contract. This is again an error on the face of the Interim Award.

7. That the learned arbitrator had misconducted himself by showing bias against the plaintiffs and failing to observe the rules of natural justice during the Remission Hearing that took place on the 2nd of April 1980 pursuant to the Order made by the Honourable Mr. Justice A.P. Rajah on the 4th of March 1980 in Originating Motion No. 39 of 1979."

Counsel for the defendants took a preliminary objection to the 2nd Motion. He said that the first five grounds were the same as those in the 1st Motion and as the 1st Motion had been disposed off on March 4, 1979 the defendants could not rely on them again. He went on to say that ground No. 6 alleged an error on the face of the Interim Award and that the plaintiffs could not now raise an allegation of an error on the face of the Interim Award and that the plaintiffs should have raised this on the 1st Motion. For these reasons counsel urged me to dismiss the Motion on the ground that it was frivolous, vexatious and an abuse of the process of the court. I agree with counsel that in view of the Order of Court of March 4, 1980 it is not now open to the plaintiffs to ask the court to go into matters which it did go into before it made the said Order. As for ground No. 6 it could have been raised in the 1st Motion: the plaintiffs cannot now be allowed to raise it in the present Motion. Further counsel referred me to paragraphs 5 and 6 of the affidavit of Tan Wai See, a director of the plaintiffs, sworn to and filed on May 12, 1980 in the 1st Motion, wherein he refers to (1) the refusal of the Arbitrator to make available to plaintiffs' counsel his notes of evidence (2) the refusal of the Arbitrator to allow counsel to make submissions and (3) the technical misconduct of the Arbitrator. This affidavit was filed in respect of the restored hearing on the question of costs which had been reserved. Counsel for the defendants suggested to me that perhaps I had taken into consideration these allegations before I awarded costs to the defendants on the 1st Motion. So far as the court was concerned these allegations concerned the remission hearings and had no bearing on whether the defendants should or should not get their costs on the 1st Motion.

As for ground No. 7, it relates to a new situation which did not exist when the said Order was made. It stems directly from the said Findings of the Arbitrator and, in my view, can therefore be properly raised by the plaintiffs now.

Ground 7

At the outset of the arbitration hearing it was agreed that the Award was to be a speaking one. In his Interim Award the Arbitrator made everything that had been placed before him part of his Interim Award except for the evidence that had been recorded by him and the submissions made to him by counsel. His Interim Award had been formulated in such a way that there appeared to be ambiguity and uncertainty in it and if tne ambiguity and uncertainty could not be cured then the Award would have had to be set aside on the basis of an error in law on the face of it. Had his notes of the hearing been made part of the Interim Award there would probably have been no necessity for the court to remit the matter back to him for clarification. The court with the aid of his notes would have been in a position to deal with the matters raised in the Motion.

It was to cure this ambiguity and uncertainty that, at the suggestion of Mr. Wu, counsel for the defendants, to which Mr. Selvadurai readily agreed, that I made the order for remission on March 4, 1980. The logical way to resolve the ambiguity and uncertainty, in my view, would have been for the notes to be looked at by the Arbitrator and counsel and not to have called to aid the perhaps uncertain recollection of busy and over-worked counsel. Their recollection of the arbitration proceedings should have been sought for, in my view, only if the notes for some reason or other had become unavailable for the use of the Arbitrator and counsel.

I would have thought that the easiest and simpliest way for the Arbitrator to have responded to the order for remission was for him to have referred to his notes and inform counsel of what had been recorded by him in them and, if requested by counsel, then to have made available to them the undisclosed part of the notes of the hearing, as the primary purpose of the remission was to ascertain what had been submitted by counsel at the hearing. When counsel for the respondents (the plaintiffs herein) asked the Arbitrator for the notes of evidence so that he could find out for himself whether Clause 25(1)(b) had been relied on he was refused such request. The reason the Arbitrator gives for his refusal is that, as he had not made his notes part of his Interim Award, he could not at the remission hearing give inspection of his notes as this would have been a variation of his Interim Award, which he was not empowered to do. And yet on page 5 of his Findings he quotes from his notes of evidence which was not part of his Interim Award and which he had denied a sight of to the plaintiffs. It reads as follows: —

"Confine evidence to the issue as to whether determination of contract was justified.

25(1)(c) of contract. 3 documents.

1. Minutes of March 23, 1978.
2. Minutes of May 17, 1978.
3. Minutes of June 2, 1978."

In my view the Arbitrator misdirected himself when he said that for the purposes of the remission hearing the notes of evidence, not having been made part of the Interim Award, could not be availed of by either party for clarification as to what happened at the original hearing. This refusal of the Arbitrator to make available the notes of evidence for clarification purposes to the plaintiffs resulted, in my view,

in the plaintiffs not getting the kind of hearing intended by the remission, that is to say, a fair hearing.

Further, it cannot be right in principle for an Arbitrator to rely on or quote in justification of his award from a document which he had expressly excluded from his Interim Award and which he had refused the party adversely affected a sight of.

There are two parts to the Remission Order, (1) whether the respondents had made Clauses 25(1)(a) and 25(1)(b) of the Building Contract dated November 15, 1975 part of their case and (2) if so, the Arbitrator do make his findings on the respondents' case under these clauses.

On the first part of the Order he makes a specific finding on Clause 25(1)(a) but he does not make a specific finding on Clause 25(1)(b) as he had on Clause 25(1)(a), although it would appear that, from what was said at the remission hearing, counsel for the respondents at the original arbitration hearing had not abandoned Clause 25(1)(b) but had concentrated on Clause 25(1)(c). In my judgment this is not an unusual stance for a counsel to take.

On the second part of the Order the Arbitrator was to make his findings on the respondents' case under these clauses. On this he ruled that he would not reopen the case and would hear no further submissions as to what notices were given which satisfied termination under Clause 25(1)(b). The case was remitted to him for a specific purpose, and the parties were represented by counsel. It is implicit in our system of justice that parties or their counsel should be heard before judgment is pronounced. But the Arbitrator ruled that he would hear neither party, presumably for the reason, as he says on page 2 of his Findings, that he had perused his notes of evidence carefully. Mr. Wu urges me to say that as both parties were treated in the same way there can be no failure of justice. I cannot accept his proposition. Both counsel would complain, and in my opinion rightly, most bitterly if they were not allowed by the court to address it before a finding of fact or in law is made. On the question of the Arbitrator failing to give the parties a proper opportunity of arguing their case see *Russell* on Arbitration (9th Ed.) at page 469 where the learned author sets out in summary form what the case of *Societe Franco-Tunisienne D'Armement-Tunis* v. *Government of Ceylon*[1] decided and why the award was remitted.

In *E. Rotheray & Sons, Ltd.* v. *Carlo Bedarida & Co.*[2] at the end of the motion to set aside or remit McNair J. observed: —

"The remaining question is whether this award should be wholly set aside or should be remitted to the arbitrators. As regards that, I feel it would be very difficult indeed for Mr. Todd, having once committed himself to the view to which he has committed himself in the award which is sought to be set aside, with the best will in the word, to approach the question with an entirely free mind. I think it is much more likely that justice would be done between the parties if this award were set aside. It will then be open to the parties to take such steps as they think fit to resolve their present dispute. Accordingly, the order of the court will simply be that the award referred to in the notice of motion will be set aside."

I respectfully adopt the words and reasoning of the learned judge and set aside the Interim Award. It is now open to the parties to take such action as they deem fit to resolve their present dispute.

Lastly it would, I think, be remiss on my part if I did not say that during the course of the hearing both counsel referred me to a number of authorities all of which in their sum total were not unhelpful.

Order accordingly.

Solicitors: *Rodyk & Davidson; Donaldson & Burkinshaw.*

GOH GIN CHYE & ANOR. v. PECK TECK KIAN REALTY PTE. LTD.

[A.C.J. (Lai Kew Chai J.) August 17, 1981]
[Singapore — District Court Appeal No. 70 of 1980]

Practice and Procedure — Landlord and Tenant — Claim for possession against tenant — Failure of appellants to include party in trial below as second respondent — Inability of court to decide on merits of appeal — S.C.R. 1970, O. 49 r. 1(5) — Control of Rent Act (Cap. 266), s. 15(i)(g).

Landlord and Tenant — Claim for possession — Failure to include party in trial below as 2nd respondent — Effect of.

The respondents, owners of the premises at 71 Kampong Bahru Road, Singapore, sought for possession of the premises against the appellants. They claimed, *inter alia,* that the appellants had sublet the premises in question to one *R* at the monthly rental in excess of $110% of the reasonable rent of $26 per month under section 15(i)(g) of the Control of Rent Act. *R* was the third defendant in the lower court proceedings.

The learned Senior District Judge held that the relationship between the appellants and *R* was that of a chief tenant and sub-tenant and that all the purported "licence" agreements were a sham and did not reflect the true relationship between them. Against this, judgment, the appellants appealed, citing only the respondents as a party to the appeal. *R*, who was a party in the trial below, was not cited as the second respondent.

Held, dismissing the appeal: *R* was a necessary party as his status and legal rights would be directly affected by any substantive decision in the appeal. As the appellants had failed to comply with Order 49 Rule 1(5) of the Subordinate Courts Rules, the appeal was dismissed without deciding on the substantive merits of the appeal.

Cases referred to:-

(1) *Foster* v. *Robinson* [1950] 2 All E.R. 342.
(2) *Errington* v. *Errington* [1952] 1 All E.R. 149.
(3) *Snook* v. *London & West Riding Investments Ltd.* [1967] 1 All E.R. 518.

DISTRICT COURT APPEAL.

V.K.S. Narayanan for the appellants.

Gan Choon Beng for the respondents.

Cur. Adv. Vult.

Lai Kew Chai J.: The respondents, Peck Teck Kian Realty Pte. Ltd. are the owners of the premises known as No. 71 Kampong Bahru Road, Singapore, including the ground floor, which ground floor is hereinafter referred to as "the premises".

By an action commenced in the District Court the respondents sought possession of the premises against the appellants on the ground that the appellants had contravened an alleged condition in the oral